REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO 2 OF 2020

JNO..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal from the Judgment of Hon C.N. Oruo (SRM)

delivered at Maseno in the Principal Magistrate's Court in

SOA Case No 10 of 2017 on 27th March 2019)

JUDGMENT

INTRODUCTION

1. The Appellant was tried and convicted of the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on diverse dates between 10th and 31st day of April 2017 at [Particulars Withheld] Village, Sunga Sub location, Kisumu District of Nyanza Province intentionally caused his penis to penetrate the vagina of SA, a child (hereinafter referred to as PW 1) aged thirteen (13) years. He was sentenced to serve twenty (20) years imprisonment.

2. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 10th and 31st day of April 2017 at [Particulars Withheld] Village, Sunga Sub location, Kisumu District of Nyanza Province intentionally touched PW 1's vagina. Having convicted him on the main count, the Learned Trial Magistrate held the alternative charge in abeyance.

3. Being dissatisfied with the said Judgement, on 10th February 2019 he lodged the Appeal herein. He set out six (6) grounds of appeal challenging both conviction and sentence. His Written Submissions were filed on 11th August 2021 while those of the State were dated 21st September 2021 and filed on 1st October 2021.

4. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before

it for determination were:-

> **a. Whether or not the Prosecution had proved its case beyond reasonable doubt.**
>
> **b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Learned Trial Magistrate was lawful and or warranted**.

8. The court dealt with the said issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION'S CASE

9. Grounds of Appeal Nos (1), (2), (5) and (6) were dealt with together under this head as they were all related.

10. The Appellant submitted that the Prosecution did not call a witness to support PW 1's evidence, which he argued was contrary to the provisions of Section 169 of the Criminal Procedure Code Cap 75 (Laws of Kenya). He added that the Trial Court shifted the burden of proof to him contrary to the provisions of Section 107 (1) of the Evidence Act Cap 80 (Laws of Kenya). It was his argument that the Trial Court did not put much emphasis on his defence which was sound and devoid of doubt as was held in the case of **Victor Mwendwa Mulinge vs Republic** (eKLR citation not provided).

11. He termed the evidence of DNA from the Government Chemist as a fabrication and averred that he was not given an opportunity to perform his own private DNA test. He further questioned if the DNA Report was procedurally adduced in evidence as the manufacturer (sic) of the said Report did not come to court. It was his argument that the content of the documentary evidence was contrary to the provisions of Section 77 (1) of the Evidence Act.

12. He contended that the medical examination which allegedly took place after a period of two (2) months did not establish if the hymen had been freshly broken. He asserted that the services at the hospital were based on the pregnancy test and not on the alleged offence (sic). He questioned why a child of thirteen (13) years failed to disclose what had befallen her to her guardian.

13. On its part, the State submitted that the Prosecution proved its case beyond reasonable doubt and urged this court to dismiss the Appeal herein. It pointed out that it had demonstrated that all the ingredients of the offence of defilement being, identification or recognition of the offender, penetration and age of the victim as was set out in the case of **George Opondo Olunga vs Republic [2016] eKLR**, were proved.

14. It argued that a copy of the birth certificate showing that PW 1 was born on 10th July 2004 and was thus a child aged thirteen (13) years at the material time was adduced in evidence.

15. It added that although Evans Odhiambo Omollo, the Clinical Officer (hereinafter referred to as "PW 5") completed the P3 Form which showed no direct medical evidence on PW 1's genitalia, No 107136 PC C. Ndanu (hereinafter referred to as "PW 6") conducted a DNA test that showed that the Appellant herein was the biological father of the child that PW 1 gave birth to which proved penetration. It was its submission that PW 1's evidence that the Appellant defiled her several times was corroborated by the said medical evidence.

16. It pointed out that PW 1 positively identified the Appellant herein as the perpetrator who PW 1 stated that she met during the month of April 2017 and defiled her several times in his house.

17. After carefully analysing the evidence that was adduced by the Prosecution, this court noted that PW 6 did not conduct the DNA test of the samples from the Appellant, PW 1 and the child who was said to have been born as a result of the union between the Appellant and PW 1 as had been submitted by the State herein. This court found it prudent to address this issue right at the outset with a view to being guided as to the conclusion it would make herein.

18. It is important to point out that statements, whether written, oral or electronically recorded are admissible facts irrespective of the maker not being available to tender such evidence in court due to several factors set out in Section 33(b) of the Evidence Act.

19. Section 33(b) of the Evidence Act states that:-

> **Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable** (emphasis court)**, are themselves admissible in the following cases—**
>
> **b. when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;**

20. A DNA Report is one such document that is made in the ordinary course of business and envisaged to be used in evidence. Indeed, Section 77 of the Evidence Act stipulates as follows:-

> **1. In criminal proceedings any document purporting to be a report under the hand of a Government analyst** (emphasis court)**,**

medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

3. When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.

21. The importance of the maker of a document cannot be gainsaid. A court will presume that the signature appearing on such document belongs to the maker of the document without necessarily requiring proof that the signature belongs to the maker of the said document.

22. Where the document is adduced by any other person other than its maker who is dead or who cannot be found or who cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proven that the signature appended on the said document to be used in evidence belonged to the maker of the document. The witness adducing the document on behalf of another must therefore be able to identify the signature of the maker of the document.

23. The emphasis of proof of the handwriting and signature of the maker of a document is seen in Section 70 of the Evidence Act which provides as follows:-

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

24. Where a document is an opinion on a point of science, it cannot be tendered in evidence other than by an expert in that area. In this regard, Section 48 of the Evidence Act provides that:-

1. <u>When the court has to form an opinion upon a point of</u> foreign law, or of <u>science</u> or art, or as to identity or genuineness of handwriting or finger or other impressions, <u>opinions upon that point are admissible if made by persons specially skilled</u> in such foreign law, <u>science</u> or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions (emphasis court)**.**

2. Such persons are called experts.

25. Whereas the Prosecution could have tendered in evidence the DNA Report as envisaged in Section 77 of the Evidence Act, it was clear that the Prosecution did not lay basis for the DNA Report to be tendered in evidence by any other person other than the maker, D.K. Kisang Government Analyst. It did not demonstrate that the said witness was dead, could not be found or could not have been procured without unreasonable delay or expense as provided in Section 33(b) of the Evidence Act. Having had due regard to the circumstances of the case herein vis a vis the aforesaid provisions of the law, Section 33(b) of the Evidence Act was applicable in the circumstances of the case herein.

26. Going further, this court was not satisfied that the Prosecution established that PW 6 was conversant with the signature of the said D.K. Kisang as contemplated Sections 70 or that he was an expert as provided in Section 48 of the Evidence Act. In any event, PW 6 was the Investigating Officer in the case and had no power under Section 48 of the Evidence Act to have adduced the DNA Report to prove penetration of PW 1 by the Appellant.

27. Whereas the proviso of Section 124 of the Evidence Act stipulates that **"where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth,"** and the Trial Court could have relied on PW 1's evidence as a single witness, this court noted that the P3 Form was completed about two (2) months after the alleged defilement and that the same did not show any abnormality to PW 1's genitalia. It was for this reason that the Prosecution relied on the DNA Report to proof penetration of PW 1's vagina.

28. This court restrained itself from commenting on whether the DNA Report linked the Appellant to the PW 1. Indeed, there was an irregularity in the manner the DNA evidence was adduced in court rendering the trial a mistrial. It was therefore in the interests of justice that the Prosecution be given an opportunity to prove its case to the required standard and in the proper manner by way of being accorded a re-trial.

29. Power to order a re-trial of a case where an appellate deems fit and fair to so order can be found in Section 354 (3)(a)(i) of the Criminal Procedure Code states that:-

"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

a. in an appeal from a conviction—

i. reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction…"

30. In the case of **<u>Japhet Bundi vs Republic [2020] eKLR</u>**, the appellate court ordered a retrial of the case when it found and held that the production of the DNA Report did not adhere to Section 33(b) as read with Section 77 of the Evidence Act. The said court was satisfied that

the Prosecution failed to demonstrate that the maker of the said DNA Report could not be procured without an unreasonable amount or of delay or expense warranting the maker's colleague to adduce the said Report in evidence.

31. Just as in the case of **Japhet Bundi vs Republic** (Supra), this court was persuaded that it should exercise its discretion to order that this matter be referred for retrial as there was a child who had been born out of the alleged union of the Appellant and PW 1 herein. There was no risk of the evidence linking both the Appellant and PW 1 being dissipated as a DNA test could be carried out again if the Prosecution did not wish to rely on that DNA Report. Otherwise there is nothing in law that prevented the Prosecution from adducing the same DNA Report in the fresh trial.

32. In the premises foregoing, this court found it prudent not to make a determination on the merits or otherwise of the Appellant's Grounds of Appeal Nos (1), (2), (5) and (6). Rather it was persuaded by his Written Submissions that the DNA Report was not properly tendered in evidence as the maker was not called to court.

II. SENTENCE

33. As the court had already found that there was a mistrial, it did not also find it necessary to address itself to Grounds of Appeal Nos (3) and (4) regarding the legality or otherwise of the sentence that was meted upon the Appellant herein.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 10th February 2019 be and is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and the conviction and sentence set aside.

35. It is hereby directed that matter be placed before the Principal Magistrate Maseno Law Courts on 9th February 2022 for allocation to a magistrate other than the Learned Trial Magistrate who heard and determined this matter for hearing and determination in a fresh trial.

36. To avoid any delays in this matter and to avoid any undue hardship to both the Appellant and PW 1, it is hereby directed that this matter be heard and determined expeditiously.

37. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY 2022

J. KAMAU

JUDGE